No. 4

In the Supreme Court of the United States

OCTOBER TERM, 1958

EMANUEL BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Appeals (R. 52–63) is reported at 247 F. 2d 332.

JURISDICTION

The judgment of the Court of Appeals was entered on July 10, 1957. The petition for a writ of certiorari was filed on August 8, 1957, and was granted on April 7, 1958 (356 U. S. 926). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the immunity provision contained in Chapter 8 of Part II of the Interstate Commerce Act (49 U. S. C. 305 (d)) applies to a witness before

a grand jury investigating possible offenses arising under that chapter, as distinguished from a witness before the administrative agency itself.

2. Whether, assuming petitioner was protected by the immunity provision, the immunity was coextensive with his privilege against self-incrimination so as to afford him adequate protection.

3. Whether petitioner could summarily be found in contempt for refusal to answer questions put to him by the trial judge in the presence of the grand jury after petitioner had disobeyed the court's initial order to return to the grand jury room and answer questions relevant to the inquiry and had been again brought before the court and ordered to answer.

4. Whether petitioner's sentence of 15 months imprisonment for criminal contempt was an abuse of the court's discretion or a cruel and unusual punishment.

STATUTES AND RULE INVOLVED

Section 205 (e) of the Interstate Commerce Act, as amended, 49 Stat. 550, 54 Stat. 922, 49 U. S. C. 305 (d), provides (as it appears in the United States Code):

> So far as may be necessary for the purposes of this chapter, the Commission and the members and examiners thereof and joint boards shall have the same power to administer oaths, and require by subpena the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents, and to take testimony by deposition, relating to any matter under investigation, as the Commission has in a matter arising

under chapter 1 of this title [*i. e.*, Part I of the Interstate Commerce Act]; and any person subpenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title [*i. e.*, Part I of the Interstate Commerce Act], unless otherwise provided in this chapter.

The Act of February 11, 1893, ch. 83, 27 Stat. 443, 49 U S. C. 46, provides:

> No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of chapter 1 of this title on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty of forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided,* That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any per-

son who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than $100 nor more than $5,000, or by imprisonment for not more than one year or by both such fine and imprisonment.

The Act of February 25, 1903, c. 755, 32 Stat. 904, 49 U. S. C. 47, provides:

No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under chapter 1 of this title or any law amendatory thereof or supplemental thereto: *Provided,* That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

18 U. S. C. 401 (3) provides:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

* * * * *

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42 (a), F. R. Crim. P., provides:

Criminal Contempt

(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge

certifies, that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

STATEMENT

On April 8, 1957, in the United States District Court for the Southern District of New York, Judge Richard H. Levet, acting under the authority of 18 U. S. C. 401 (3), *supra,* and in accordance with Rule 42 (a) of the Federal Rules of Criminal Procedure (R. 4–5), *supra,* p. 4, cited petitioner for contempt of court for refusing to answer certain questions in the court's presence. Petitioner was given a sentence of one year and three months imprisonment (R. 3–4, 49).

The contempt citation grew out of the following circumstances:

On April 5, 1957, petitioner appeared pursuant to subpoena to testify as a witness before a grand jury then engaged in investigating alleged violations of Part II of the Interstate Commerce Act, as amended (54 Stat. 919, 49 U. S. C. 301, *et seq.*) (R. 6–9, 17–23). The subpoena directed him to testify as to (R. 19) "all and everything which you may know in regard to an alleged violation of Sections 309, 322, Title 49, United States Code." On the occasion of his appearance before the grand jury, petitioner was accompanied by his attorney who remained in the anteroom during the questioning (R. 18). After being sworn, petitioner was asked: "Mr. Brown, are you associ-

ated with Young Tempo, Incorporated?", and he replied, "I refuse to answer because by answering I may tend to incriminate myself" (R. 19).

Petitioner was then advised by the government attorney that the grand jury was conducting an investigation into possible violations of the Interstate Commerce Act; that under 49 U. S. C. 305 (d), *supra*, pp. 2–3, Congress had provided that any witness compelled to give testimony as to such matters would, by virtue of his testimony, be given immunity from federal prosecution as to any crime which might arise out of the subject matter of his testimony; that the "granting of immunity is as broad as the constitutional protections which [petitioner] would otherwise have under the Fifth Amendment"; and that, as a result of such immunity, petitioner had no privilege entitling him to refuse to answer (R. 19–20).[1] The grand jury foreman, on request of the government attorney, again asked petitioner the same question, whereupon petitioner requested and was given leave to consult his attorney concerning his rights (R. 20). On his return to the grand jury room he was again asked the question and again refused to answer on the ground of self-incrimination (R. 20–21).

Petitioner was again informed that, under the circumstances previously explained to him (which he said he understood), the privilege was not available

[1] On March 25, 1957, eleven days prior to his grand jury appearance, petitioner's attorney, in a conference with government attorneys, was specifically advised of the government's intention to compel petitioner's testimony pursuant to this statutory grant of immunity (R. 8, 9–10).

to him, and was warned that should he persist in his refusal he could be cited in contempt. At this juncture he was again given leave to consult with his attorney, and on his return, after being asked the same question a second time by the foreman, he again refused to answer it on the same ground (R. 21–22). He similarly refused to answer on the ground of self-incrimination five other questions (R. 22–23) undisputedly relevant to the grand jury inquiry.

The transcript of the grand jury proceedings involving petitioner was read to the court (R. 17–23). In support of his argument that the immunity afforded was not coextensive with the privilege, petitioner's counsel told the court that petitioner had been questioned before two other grand juries, one relating to the Victor Riesel obstruction-of-justice case, and the other relating to alleged racketeering in the garment trucking industry (R. 26), and that he had claimed the privilege against self-incrimination in those inquiries. He argued that, should petitioner testify in the instant grand jury proceedings, the immunity afforded him would not be sufficient to protect him against the use of his testimony in prosecutions arising out of those other inquiries, or in other collateral proceedings, such as possible violations of the internal revenue laws (R. 28–30).

On April 8, 1957, the court ruled that the immunity provisions of the Interstate Commerce Act afforded petitioner complete immunity "from prosecution for all matters on which he is questioned before this grand jury" (R. 36). The court directed him to answer the questions before the grand jury (R. 35,

36.)[2] Later in the afternoon, the grand jury returned to the courtroom and through government counsel again requested the assistance of the court with reference to petitioner's continued refusal to answer the questions (R. 36).[3] Government counsel explained that (R. 36), "[a]t this point the grand jury is merely requesting the assistance of the Court", but requested that if it appeared from the testimony of the grand jury reporter that petitioner was per-

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[2] The court's ruling appears in the following extract of the record (R. 34–35):

* * * * *

"The Court. In this matter I have determined that the witness must testify as to the questions which were propounded. I believe that the statutory sections, particularly Section 305 (d), Title 49, and Section 46 of Title 49, adequately provide for immunity in the instances involved; I believe that the immunity applies to a grand jury, see Brown v. Walker, 161 U. S. 59.

"I believe in general that the immunity applies in the State Courts, see Adams v. Maryland, 347 U. S. 179.

"The immunity exists even though no privilege is claimed, see U. S. *v.* Monia, 317 U. S. 424.

"The United States Attorney is charged with enforcement of the United States criminal laws and under the Rules of Criminal Procedure I believe that the witness must answer. Therefore I direct this witness, Emanuel Brown, to answer the questions propounded as they were repeated before me on Friday.

"Have I covered everything?

"Mr. Wachtell. I believe so, your Honor.

"The Court. Then, therefore, the grand jury will retire and the question will be propounded and whatever happens will be taken up from there."

* * * * *

[3] The record is silent as to whether the courtroom had been cleared on this occasion. This point is discussed *infra* at pp. 49–50.

sisting in his refusal to answer the questions (R. 36–37), "that the Court itself, in the presence of the grand jury, will put the six questions to the witness and ask him, first, whether he is willing to answer them now, and, second, would he answer them if he were sent back to the grand jury again". Government counsel also requested that, if petitioner persisted in his refusal to answer he be held in summary contempt under Rule 42 (a) of the Federal Rules of Criminal Procedure. The grand jury reporter then took the stand and read the transcript of the proceedings before the grand jury (R. 37–40).

On the application of government counsel, the court called petitioner to the stand to ask him the questions which he had refused to answer before the grand jury (R. 40). Petitioner's counsel objected to this procedure on the ground that "the witness is now being asked in a criminal cause to be a witness" (R. 40). The court, noting that the immunity statute protected petitioner, overruled the exception and stated that the proceedings were "a continuanee of the grand jury proceeding, before the Court" (R. 40). Petitioner, on being called to the stand, was asked by the court, in the presence of the grand jury, the questions he had previously refused to answer before the grand jury. In each instance he again refused to answer on the ground that the question tended to incriminate him (R. 53–55). The court asked each question a second time and he again refused to answer (R. 55–57). The following then ensued (R. 44–45):

* * * * *

Q. You have declined to answer these questions here before me in this courtroom and be-

fore this grand jury which is here. Do I understand that you will maintain that position and that you will not answer if you are returned to the grand jury room, to answer these questions?

Mr. SHAPIRO. I object, your Honor.

The COURT. Overruled.

Mr. SHAPIRO. Exception.

A. Yes, sir.

Q. And do you believe that these answers will incriminate you?

Mr. SHAPIRO. I object to that question, your Honor.

The COURT. Overruled.

Mr. SHAPIRO. Exception.

Q. Do you believe that the answers to these questions just asked you would incriminate you in any way?

Mr. SHAPIRO. I object to that as wholly improper, your Honor, a violation of his privilege.

The COURT. Overruled.

Mr. SHAPIRO. Exception.

A. I refuse to answer.

* * * * *

The COURT. Very well. By reason of your refusal to answer in the actual presence of this Court, I am forced to act upon this matter.

* * * * *

The court then again heard counsel for both sides on the legal issues involved (R. 45–47). Thereafter, it adjudged petitioner in contempt (R. 47) and imposed sentence (R. 49). On appeal, the judgment was affirmed (R. 64).

SUMMARY OF ARGUMENT

I

The immunity provided in 49 U. S. C. 305 (d), *supra,* pp. 2–3, extends to a witness before a grand jury investigating possible violations of Part II of the Interstate Commerce Act. The statute by its literal terms applies to "any person" subpoenaed in connection "with any matter under investigation under this part". It also confers the same rights and prescribes the same duties "as though such matter arose under [Part I]". Since it had long been settled, before Part II was enacted, that the immunity of Part I applied to grand jury investigations, it is evident that Congress intended to confer the same grant of immunity in Part II. Part II, like Part I, has criminal sanctions.

This construction is reinforced by the structure of the Interstate Commerce Act. Part II and the subsequently enacted Part III of the Act are interrelated parts of legislation designed to establish uniform federal control over the transportation field. The immunity in Part III, like that in Part I, applies to witnesses before grand juries.

The fact that the immunity provision of Section 305 (d) appears as the second clause of that section does not mean that it must be read narrowly as qualified by the first clause which grants investigatory power to the Commission itself, similar to the power which the Commission has in a matter arising under Part I. The first clause was based on Section 12 of the Interstate Commerce Act (as amended) in

Part I, and was necessary to grant investigatory power to a commission which has no inherent authority to investigate. There was no need to mention the already existing investigatory powers of grand juries. The second clause of Section 305 (d)—the immunity provision—adopts by reference other provisions of Part I dealing with immunity, which clearly covered grand jury investigations. Since the two clauses incorporate by reference diverse sections of the original act, each clause should be given its full and independent meaning. The legislative history shows that this was the Congressional intent; that Congress itself sharply distinguished the two subdivisions of Section 305 (d). The settled construction of Part I—*i. e.*, that it is applicable to witnesses before grand juries investigating possible violations of Part I—is therefore properly adopted as the construction of the immunity provision of Part II.

II

The immunity provided by Section 305 (d) is coextensive with the privilege against self-incrimination and adequately protects the witness. It extends to any transaction, matter or thing concerning which the witness may testify and is applicable whenever and in whatever court such prosecution may be had. It protects the witness from prosecution based on the testimony and information derived from the testimony. Since the immunity conferred by Part I has been held to be adequate to bar reliance on the privilege (*Brown* v. *Walker*, 161 U. S. 591), the coextensive immunity in Part II is similarly adequate.

III

There was no procedural defect in the method by which the contempt was adjudicated. Petitioner was given ample notice and opportunity to be heard. The sole issue was one of law, whether petitioner could validly claim the privilege in the face of the statutory grant of immunity. That issue of law was fully argued on the original request by the grand jury for a court ruling after petitioner had first refused to testify. When the court made its ruling of law, it did not then start proceedings for contempt, but directed petitioner to answer the questions before the grand jury. Petitioner again came before the grand jury and refused to answer. While contempt proceedings could then have been instituted on notice under Rule 42 (b), petitioner was not injured by the fact that the court chose not to regard this refusal as the completed contempt. Rather, the judge gave petitioner still another chance to comply with his ruling by calling petitioner before the court, at which time the judge asked petitioner the questions in the presence of the grand jury. In so doing, the court gave petitioner the same opportunity he would have had, if contempt proceedings had been instituted for the refusal to testify before the grand jury, to reargue his legal contention that he was not required to answer. This procedure, by which the court itself asked the questions after petitioner's refusal before the grand jury to comply with the ruling, afforded petitioner a *locus poenitentiae* before the court was faced with the necessity of finding him in contempt. But when, after

two extended arguments on the only issue involved, the court adhered to its original ruling, nothing more remained to be decided. A summary adjudication and sentence for contempt for refusal to obey the direction of the court at that time was therefore entirely proper and consonant with due process. The procedure followed here is the usual method by which the court's direction to answer is incorporated in a final judgment which may be tested on appeal. *Rogers* v. *United States,* 340 U. S. 367.

There is no doubt that the court had power itself to put the questions to the witness. The authority to compel the testimony of a witness before the grand jury is a power vested in the court. When petitioner was put on the stand before the court, after his refusal to testify before the grand jury, he was called, not to explain his prior acts of refusal before the grand jury, but to testify as a witness before the grand jury. The proceeding was a continuance of the grand jury investigation before the court. Had petitioner given the answers as requested, no contempt proceedings would have resulted. It was his last act of refusing to answer the questions of the court itself which was the foundation of the contempt. And since that act occurred in the presence of the court, summary adjudication for contempt was proper.

Petitioner's argument that the proceedings were secret was raised for the first time in the Court of Appeals and was properly held to have been made too late. While the record shows that the courtroom was cleared at the time of the argument on the original request for a ruling as to petitioner's obligation to

answer, petitioner's counsel raised no objection to this procedure. This session culminated only in the court's order directing petitioner to return to the jury room and was in no sense a proceeding in contempt.

The record is silent as to whether the courtroom was cleared when petitioner again came before the court after his second refusal to testify before the grand jury. Petitioner asserts that it cannot be "factually disputed" that the courtroom was cleared and we have therefore gone outside the record to ascertain what took place. We are informed that the hearing was conducted in a courtroom usually open to the public at a time when no spectators were present, and that no ruling admitting or barring the public was made or requested. The crucial fact, however, is that petitioner's counsel was present and fully participated in all of the proceedings before the court. Here, unlike the situation where attempts have been made to punish for contempt committed before a one-man judge-grand jury, petitioner's contempt was committed in recorded proceedings at a time when he was represented by counsel.

To the extent that the proceeding was a continuation of the grand jury's inquiry, absence of the public was appropriate and consonant with the usual mode in which a grand jury operates. When the inquiring function of the grand jury ceased by virtue of petitioner's refusal to comply with the court's order, all that remained was for the court to enter an adjudication of contempt and to impose sentence. This was in fact done and immediately made a matter of public record. The procedure followed was, as noted above, essentially designed to accord petitioner a further op-

portunity to comply with the court's ruling, and he has no basis for complaint.

IV

The sentence of imprisonment for one year and three months was not an abuse of discretion. The district court, which has primary responsibility in the matter, manifestly considered that petitioner's refusal to testify was a willful attempt to block the grand jury's investigation. The fact that the penalty provisions of the Motor Carrier Act are less severe is irrelevant since the offenses defined by the statute are different in character from the willful act of keeping pertinent information from a grand jury even though the witness has no basis for a claim of privilege.

ARGUMENT

I

THE IMMUNITY PROVIDED IN 49 U. S. C. 305 (d) APPLIES TO A WITNESS IN A GRAND JURY INVESTIGATION OF POSSIBLE VIOLATIONS OF PART II OF THE INTERSTATE COMMERCE ACT

Petitioner seeks to justify his refusal to answer questions on the ground that, as a witness before a grand jury, he was not within the coverage of the immunity provision of Section 205 (e) of Part II of the Interstate Commerce Act, as amended, 49 U. S. C. 305 (d).[4] That Section provides as follows (49 U. S. C. 305 (d)):

> So far as may be necessary for the purposes of this chapter, the Commission and the members

[4] Part II of the Interstate Commerce Act is the Motor Carrier Act; Part I of the Interstate Commerce Act deals with railroads.

> and examiners thereof and joint boards shall have the same power to administer oaths, and require by subpena the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents, and to take testimony by deposition, relating to any matter under investigation, as the Commission has in a matter arising under chapter 1 of this title [*i. e.*, Part I of the Interstate Commerce Act]; *and any person subpenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title* [*i. e.*, Part I of the Interstate Commerce Act], *unless otherwise provided in this chapter.* [Emphasis added.]

Petitioner argues that the italicized immunity provision, which adopts by reference the immunity provisions of Part I of the Interstate Commerce Act, should not be literally interpreted as applying to "*any* person subpoenaed or testifying in connection with *any* matter under investigation under this [part]" [emphasis added] but must, as a matter of construction, be read together with the first clause of the subsection granting investigatory power to the Interstate Commerce Commission itself. Petitioner would thus read the second clause as meaning "under investigation under this [part] by the Commission." The anomalous result of such an interpretation would be that, while the immunity provisions would be available to the Commission in investigating possible violations of Part II of the Interstate Commerce Act, if judicial proceedings were instituted by the Commission to

enforce the sanctions set forth in 49 U. S. C. 322, or if, as in this case, a grand jury undertook such an investigation on its own initiative, no equivalent immunity would be available respecting the testimony of a witness before the grand jury. We submit that petitioner's suggested interpretation is refuted, not only by the language of the provision itself, but also by its functional relationship to other provisions of the Act, and by its history.

A. THE LANGUAGE, CONTEXT AND HISTORY OF 49 U. S. C. 305 (d) DEMONSTRATES ITS PURPOSE TO AFFORD IMMUNITY, SIMILAR TO THAT CONFERRED BY PART I, TO WITNESSES SUBPOENAED OR TESTIFYING IN ANY INVESTIGATION ARISING UNDER PART II OF THE INTERSTATE COMMERCE ACT

1. *The Language.* Section 305 (d), *supra,* pp. 2–3, literally extends immunity to "any person subpoenaed or testifying in connection with any matter under investigation under this part [Part II of the Interstate Commerce Act]", and provides that such person "shall have the same rights, privileges and immunities and be subject to the same duties, liabilities and penalties as though such matter arose under [part I]". This language is not limited to witnesses before the Interstate Commerce Commission itself; it applies to "any person" who is subpoenaed or who testifies "in connection with any matter under investigation under this [part]". The witness is placed in the same position, in relation to an investigation of any matter arising under Part II, as a witness whose testimony is compelled in any equivalent investigation of a matter which "arose under [part I]." The immunity thus attaches, not by virtue of a witness' appearance or testimony before

a particular investigative agency, but because he has been compelled to appear and testify as to a matter arising under Part II of the Interstate Commerce Act.[5]

The fact that the first clause of Section 305 (d) refers only to the Commission, and does not grant to grand juries investigatory power which they already possess, does not suggest that the immunity provision in the second clause is limited to Commission investigations. It would have been completely superfluous to have redefined, for purposes of enforcing the criminal provisions of the Motor Carrier Act (Part II of the Interstate Commerce Act), the scope of the traditional inquisitorial powers of the grand jury, and the absence of any reference to such power in the first clause of Section 305 (d) has no more significance than the absence of such reference in Section 12 of the Act (49 U. S. C. 12, *infra*, pp. 22–23) defining the investigative authority of the Commission under Part I. Logically, the express grant of investigative authority in the first clause was limited to the same authority "as the Commission has in a matter arising under [part 1]" since, unlike the grand jury, the Commission has no inherent authority and its powers must rest on a specific statutory grant. This reference to Commission authority under Part I does not suggest

[5] It is perhaps significant that the power granted to the Commission in the first clause of Section 305 (d) relates to "witnesses", whereas the immunity granted by the second clause relates to "any person", a broader, more inclusive, category also referred to in the various immunity provisions of Part I of the Interstate Commerce Act (49 U. S. C. 46, 47, and 48). See *United States* v. *Minker*, 350 U. S. 179, 186–189.

the absence of any investigative authority in grand juries to investigate matters arising under Part II. The Motor Carrier Act, like the original Interstate Commerce Act, contains penalty provisions which can be enforced only through the judicial process (49 U. S. C. 322), and power in the grand jury to investigate is implicit in any such penalty provision.

Nor does the language of the second clause suggest that it relates back or is qualified by the first clause. Aside from the bare fact that the two clauses are separated by a semi-colon, there is no evidence of any Congressional intent that the clauses be read together. The terms of the second clause, extending the same immunity as under the compulsory testimony provisions of Part I to "any person subpoenaed or testifying in connection with any matter under investigation under this [part]" (*i. e.*, the Motor Carrier Act amendment to the Interstate Commerce Act), contain no ambiguity which would justify a narrower reading than the words import. Cf. *United States* v. *Minker*, 350 U. S. 179, 184–186.

Since investigations under Part II, as in the case of Part I, include, in addition to investigations by the Commission, inquiries by grand juries necessary to determine the criminal liability of persons under the penalty provisions,[6] it is reasonable to assume that the inclusive language of the second clause was meant

[6] It is established, as shown in Subpoint B, *infra*, pp. 28–33, that the immunity provisions of Part I of the Act relate to witnesses in grand jury investigations. See *Brown* v. *Walker*, 161 U. S. 591; *Hale* v. *Henkel*, 201 U. S. 43, 66; *Heike* v. *United States*, 227 U. S. 131; and cf. *United States* v. *Monia*, 317 U. S. 424.

to be given its natural and logical meaning, *i. e.*, that any person subpoenaed or testifying as to matters arising under Part II is in precisely the same position as though he were testifying as to matters arising under Part I.

2. *The Context.* Even if the literal words of the section were not otherwise clear, there would be no basis for construing the language of Part II of the Interstate Commerce Act to produce a result "plainly at variance with the policy of the legislation as a whole". See *United States* v. *American Trucking Ass'ns.*, 310 U. S. 534, 542–544. In enacting the Motor Carrier Act as Part II of the Interstate Commerce Act, Congress was extending the authority of the Commission, and other regulatory bodies having jurisdiction under the original Act, to a new subject-matter. It subsequently further extended that authority in the so-called Water Carrier Act, which became Part III of the Interstate Commerce Act. Congress thus created a single body of legislation with interrelated parts designed to promote an integrated and uniform control system over that part of the transportation field subject to federal control. See Sections 1 and 16 of the Act of September 18, 1940, 54 Stat. 899, 919; *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612, 616–617;[1] *American Trucking Ass'ns.* v. *United States,* 101 F.

[1] There, this Court said (323 U. S. at pp. 616–617):

"The 1940 Transportation Act is divided into three parts, the first relating to railroads, the second to motor vehicles, and the third to water carriers. That Act, as had each previous amendment of the original 1887 Act, expanded the scope of regulation in this field and correlatively broadened the Commission's

Supp. 710, 720–721 (N. D. Ala.). In framing the new provisions of the supplementary legislation, Congress found it expedient to adopt or incorporate by reference many provisions of Part I of the Interstate Commerce Act. The references in the supplemental legislation, of course, derive meaning from the text of the original provisions of the parent legislation which they incorporate.

The first clause of Section 305 (d) incorporates by reference the provisions of Section 12 of the Interstate Commerce Act, as amended,[8] which defines the

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powers. The interrelationship of the three parts of the Act was made manifest by its declaration of a 'national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each.' The declared objective was that of 'developing, coordinating, and preserving a national transportation system by water, highway, and rail, * * * adequate to meet the needs of the commerce of the United States * * *.' Congress further admonished that 'all of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.' 54 Stat. 899."

[8] Section 12 now provides (49 U. S. C. 12):

"(1) The Commission shall have authority, in order to perform the duties and carry out the objects for which it was created, to inquire into and report on the management of the business of all common carriers subject to the provisions of this chapter, and to inquire into and report on the management of the business of persons controlling, controlled by, or under a common control with, such carriers, to the extent that the business of such persons is related to the management of the business of one or more such carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted. The Commission may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this chapter; and may transmit to

investigative authority of the Interstate Commerce Commission. In so doing it equates the investigative authority of the Commission in respect to both parts of the Commerce Act.

The second clause of Section 305 (d), on the other hand, adopts by reference other provisions of the Interstate Commerce Act, unrelated to the subject matter of Section 12, and dealing exclusively with the subject of the immunities of witnesses. These Part I provisions (adopted by the second clause of Section 305 (d) of the Motor Carrier Act) provide that any "person" testifying in a Part I investigation is entitled to immunity if he testifies in a civil enforcement proceeding (49 U. S. C. 43), or "in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of [part I]" (49 U. S. C. 46; *supra*, pp. 3–4), or "in any proceeding, suit, or prosecution under [part 1] or any law amendatory

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Congress from time to time such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary. The Commission is authorized and required to execute and enforce the provisions of this chapter; and, upon the request of the Commission, it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this chapter the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation."

thereof or supplemental thereto * * * (49 U. S. C. 47, *supra*, p. 4).

Since the two clauses of Section 305 (d) relate to different subject matters, and each incorporates by reference diverse sections of the original Act which themselves are unrelated both textually and historically, it is apparent that Congress intended each clause of Section 305 (d) to be given its full and independent meaning on the basis of its own parentage.

3. *The Legislative History.* The legislative history of Section 305 (d) shows that Congress in fact sharply distinguished between the two subdivisions of the subsection, and that the differences in the language of the subdivisions reflect precisely what was intended. The Motor Carrier Act was introduced in Congress in 1935 as S. 1629 (74th Cong., 1st Sess.). On the floor of the House of Representatives, the bill having been favorably reported from committee, two amendments were offered to Section 305 (d). See 79 Cong. Rec. 12232. The last phrase of the first subdivision of Section 305 (d), in its original version, read:

> as though such matter arose under Part I.

This was amended to its present form:

> as *the Commission* has in a matter arising under Part I. [Emphasis added.]

However, the parallel language of the second subdivision of Section 305 (d), which originally read:

> as are provided in Part I,

was made to read, as it still does:

> as though *such matter* arose under Part I. [Emphasis added.]

The changes were accepted by both the House and Senate. 79 Cong. Rec. 12232, 12460. By these amendments, Congress clarified its intent to have the powers granted in the first subdivision of Section 305 (d) apply to hearings before the Commission, but at the same time made it even more explicit that what is determinative of the applicability of the second clause of Section 305 (d) is the origin of the "matter", not the nature of the investigating body.

The device of employing one subsection as a catch-all provision to incorporate by reference various provisions of another act is by no means unusual, and is particularly useful where, as in the Interstate Commerce Act, an original body of law is being supplemented by new provisions. It was entirely appropriate, therefore, for Congress, in carrying forward provisions of Part I of the Interstate Commerce Act into Part II, to employ this device. The joinder of both clauses in a single subparagraph of Part II of the Interstate Commerce Act accomplishes the same purpose as the counterpart provision (Section 916 (a) (316 (a)) in Part III (water carriers) of the same Act, in which it is provided (Sec. 316 (a), as added by Sec. 201 of the Act of September 18, 1940, 54 Stat. 929, 946, 49 U. S. C. 916 (a)) that:

> The provisions of section 12 and section 17 of part I, and the Compulsory Testimony Act (27 Stat. 443), and the Immunity of Witnesses Act (34 Stat. 798; 32 Stat. 904, ch. 755, sec. 1), shall apply with full force and effect in the administration and enforcement of this part.

Although enacted five years after Part II, Part III (water carriers) is part of a broad revision of the entire Interstate Commerce Act bringing its provisions under one uniform policy of administration (54 Stat. 899, 919), and reflects a Congressional understanding that Section 305 (d) is for Part II, the equivalent of Section 916 (a) in respect to Part III.[58]

Petitioner's attempt to restrict the broadly drawn immunity provisions of the second clause of Section 305 (d) to Commission investigations, dealt with in the first clause, thus has no support. Whatever significance the fact that statutory provisions are placed within a single subsection may have for construction problems involving other statutes, it is clear that Congress here intended the broad language of the second clause to be applied as literally written, and as applied in Parts I, III, and IV of the same Act to which it is *in pari materia*.

Petitioner argues, however, that other immunity provisions have specifically limited the immunity granted to witnesses appearing before the administrative agency itself, and that Section 305 (d) should be similarly construed in the absence of special language making it applicable to all kinds of investigations arising under Part II of the Interstate Commerce Act. The short answer to this argument is that, as we have shown, in making the Part I immunities available to "any person subpenaed or testifying in connection with any matter under investigation under this part,"

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[58] See, also, the immunity provision of Part IV (freight forwarders) of the Interstate Commerce Act, Section 417 (49 U. S. C. 1017).

Congress undoubtedly felt that it was adequately framing a provision which would be applicable to any "investigation under this [part]" (including its penalty provisions) without specifying that the immunity would be available in grand jury proceedings. Since Congress was borrowing provisions from another part of the same Act, it would hardly seem necessary to recapitulate all of the language of the original provisions in order to incorporate them into the supplementary legislation. The most accurate index of Congressional intent is not the manner in which Congress has provided for witness immunity in unrelated statutes, but the manner in which it has drafted cognate immunity provisions in other parts of the same Act. These evidence an intent that Section 305 (d) apply to all investigations, including grand jury investigations, of matters arising under Part II of the Act.

The immunity formula as worked out in the 1893 law and as sustained in *Brown* v. *Walker,* 161 U. S. 591, has been widely adopted in federal legislation with certain modifications to suit the scheme of the particular legislation. Dixon, *The Fifth Amendment and Federal Immunity Statutes,* 22 Geo. Wash. L. R. 447, 466.[9] In a few instances the immunity provision is

[9] For a list of such statutes see 8 Wigmore, *Evidence,* § 2281, fn. 11 (3d ed. and 1957 Pocket Supp.); *Shapiro* v. *United States,* 335 U. S. 1, 6–7, fn. 4, and see *Ullman* v. *United States,* 350 U. S. 422, 438.

in terms specifically restricted to proceedings before the administrative agency (*e. g.*, Perishable Agricultural Commodities Act, 7 U. S. C. 499 m (f); Federal Trade Commission Act, 15 U. S. C. 49); in others, it is patently applicable either in administrative proceedings or in any cause or proceeding, criminal or otherwise, under the statute, including grand jury proceedings (*e. g.*, Civil Aeronautics Act, 49 U. S. C. 644 (i); Federal Communications Act, 47 U. S. C. 409 (d); Defense Production Act of 1950, 50 U. S. C. App. 2155 (b); Shipping Act, 46 U. S. C. 827).[10] In many other instances federal statutes merely adopt the basic Compulsory Testimony Act (of Part I of the Commerce Act) by reference. *E. g.*, the so-called Water Carriers Act, 49 U. S. C. 901, 916 (a), and Freight Forwarders Act, 49 U. S. C. 1001, 1017 (Parts III and IV, respectively, of the Interstate Commerce Act); the Commodity Exchange Act, 7 U. S. C. 15.

For the reasons we have set forth, Section 305 (d) is clearly a provision of the latter category, intended to incorporate *in toto* the provisions of the Compulsory Testimony Act of Part I, into Part II. Regardless of the evolution of other immunity statutes which are specifically limited to proceedings before the regulatory agency—and other acts which vary the basic formula of the Interstate Commerce Act—the provision here is properly construed as co-extensive with the immunity provisions of Part I.

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[10] See also Sec. 30 of the National Prohibition Act, October 28, 1919, 41 Stat. 317, 27 U. S. C. (1926 ed.) 47; *United States* v. *Weinberg*, 65 F. 2d 394 (C. A. 2), certiorari denied, 290 U. S. 675; *United States* v. *Goldman*, 28 F. 2d 424, 432–434 (D. Conn.); *United States* v. *Moore*, 15 F. 2d 593 (D. Oregon).

B. SINCE THE IMMUNITY CONFERRED BY PART II IS COEXTENSIVE WITH THAT CONFERRED BY PART I, IT PROPERLY APPLIES TO GRAND JURY INVESTIGATIONS

On the view we have just urged, the meaning of Section 305 (d) need not be considered as an abstract or original proposition since, being a reenactment for purposes of Part II of the Interstate Commerce Act of the basic immunity provisions of Part I, it presumably adopts the judicial construction of the parent legislation. *Shapiro* v. *United States,* 335 U. S. 1, 20. This presumption is particularly warranted in this case since the immunity formula of Part I of the Interstate Commerce Act which Section 305 (d) adopts by reference, had, prior to 1935, been firmly settled in meaning by various opinions of this Court. The formula had been judicially approved on the basis that the protection afforded the witness was coextensive with his privilege against self-incrimination in every respect, and it had been construed to be applicable, not only in administrative, but also in grand jury, proceedings arising under the Interstate Commerce and Sherman Acts. See *Ullmann v. United States,* 350 U. S. 422, 436–439. The judicial history which is a gloss on Section 305 (d) may be summarized as follows:

The original immunity statute enacted in 1868 (15 Stat. 37) was a general provision providing that no evidence "obtained by means of any judicial proceeding from any party or witness * * * shall be given in evidence, or in any manner used against such party or witness, or his property or estate, in any court of the

United States, or in any proceeding by or before any officer of the United States, in respect to any crime, or for the enforcement of any penalty or forfeiture * * *." This provision was successfully challenged in *Counselman* v. *Hitchcock*, 142 U. S. 547, in proceedings arising out of a grand jury investigation of possible criminal violations of the Interstate Commerce Act. There the witness who had claimed the privilege as to questions asked before the grand jury contended that the immunity provision was not sufficiently broad to immunize him from the effects of his testimony. This Court, in sustaining Counselman's position, held the immunity provision invalid because it (142 U. S. at p. 564) "would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding * * *." The Court also rejected the contention that the privilege could be raised only in a criminal trial, holding that it was available as to any questions tending to show the witness had committed a crime.

Thereafter, in order to meet the infirmity of the prior legislation, Congress enacted the Compulsory Testimony Act of 1893 (27 Stat. 443, 49 U. S. C. 46, *supra*, pp. 3–4), the prototype of federal immunity legislation.[11] This Act provided that no person would be excused from attending and testifying

[11] The Act was entitled "An act in relation to testimony before the Interstate Commerce Commission, and in cases or proceedings under or connected with an act entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and amendments thereto." 27 Stat. 443.

before the Interstate Commerce Commission "or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled, 'An act to regulate commerce' * * *"; but also provided:

> * * * But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided,* That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Two years later, in 1895, again in respect to a refusal to testify before a grand jury concerning an alleged rate violation under the Interstate Commerce Act, this Court in *Brown* v. *Walker,* 161 U. S. 591, held that the immunity provision of the 1893 statute "sufficiently satisfies the constitutional guarantee of protection." And see *Ullmann* v. *United States, supra* (350 U. S. at pp. 436–439); *United States* v. *James,* 60 Fed. 257, 260 (N. D. Ill., 1894).

In February 1903, Congress provided for immunity in three additional measures: (1) the Act of February 14, 1903, 32 Stat. 828, establishing the Department of Commerce and Labor and conferring upon the Commissioner of Corporations the investigatory powers possessed by the Interstate Commerce Act; (2) the Elkins Amendment of February 19, 1903, 32 Stat. 848, 49 U. S. C. 43, to the Interstate Commerce

Act; and (3) the Act of February 25, 1903, 32 Stat. 903–904, 49 U. S. C. 47, 15 U. S. C. 32, appropriating monies for the enforcement of the Interstate Commerce Act, the Sherman Act, and other enactments. In *Hale* v. *Henkel,* 201 U. S. 43, 66, this Court held that a grand jury inquiry was a "proceeding" within the meaning of the proviso to the Act of February 25, 1903 (49 U. S. C. 47, *supra,* p. 4); apparently in order to ratify this interpretation, Congress subsequently provided in Section 9 of the Act of June 29, 1906, 34 Stat. 584, 595:

> That all existing laws relating to the attendance of witnesses and the production of evidence and the compelling of testimony under the Act to regulate commerce and all Acts amendatory thereof shall apply to any and all proceedings and hearings under this Act.

And in the Act of June 30, 1906, 34 Stat. 798, 49 U. S. C. 48, Congress provided that the immunity provisions of 49 U. S. C. 43, 46, and 47, would "extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath." [12]

It thus seems clear that the immunity provisions of the Interstate Commerce Act were intended to secure the testimony of witnesses before grand juries investi-

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[12] Subsequent cases deemed the Compulsory Testimony Act to be broadly applicable in respect to individual witnesses called to testify in grand jury investigations under the Sherman Act. *Heike* v. *United States,* 227 U. S. 131; *United States* v. *Monia,* 317 U. S. 424; and see *United States* v. *Greater Kansas City Retail Coal Merchants' Ass'ns.,* 85 F. Supp. 503, 513–514 (W. D. Mo.); see Dixon, "*The Fifth Amendment and Federal Immunity Statutes,*" 22 Geo. Wash. L. R. 447.

gating criminal matters arising under that Act "as aids in the enforcement of criminal justice". *United States* v. *Monia*, 317 U. S. 424, (diss. op. of Mr. Justice Frankfurter); Dixon, *op. cit.*, 22 Geo. Wash. L. R. at p. 463. During the one hundred years that federal immunity statutes have been in existence (see *ibid.* at pp. 449–454), their purpose has been to exchange an immunity for what otherwise would be incriminating evidence. The maximum utility of the immunity provisions in the Interstate Commerce Act is reached when the investigation of activities of persons subject to the Act are being investigated for possible violations of its penalty provisions—a function shared by the Commission (at least in the first instance) and grand juries.

II

SECTION 305 (d) ADEQUATELY PROTECTS THE WITNESS

Petitioner argues (Pet. Br. 19–22) that, even if Section 305 (d) incorporates the immunity granted by Section 46 of Part I, it grants inadequate protection. He contends that the phrase "in connection with any matter under investigation under this [part]" limits the immunity to offenses arising under the part and does not give protection as to collateral crimes. The qualifying phrase is, however, descriptive of the class of witnesses to whom the immunity will attach (*i. e.*, "any person subpenaed or testifying in connection with any matter under investigation under this [part]"). It does not limit the extent of the immunity granted to such a witness. The immunity is otherwise defined in Section 46 in language of broad import to include

"any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise." This immunity, which extends to any "transaction, matter or thing" concerning which the the witness may testify, is applicable "whenever and in whatever court such prosecution may be had." *Brown* v. *Walker,* 161 U. S. 591, 608. It protects the witness from future prosecution based on the testimony given and sources of information obtained from the compelled testimony.

Under our interpretation of Section 305 (d) as incorporating *in toto* the immunity features of Part I, there can be no question but that the protection granted in every respect is as broad as the privilege against self-incrimination which would otherwise be available—an issue resolved in *Brown* v. *Walker, supra,* the holding of which was recently reaffirmed in *Ullmann* v. *United States,* 350 U. S. 422, 436–439. As this Court noted in *Ullmann,* the immunity provisions of Part I of the Interstate Commerce Act sustained as sufficient protection to the witness in *Brown* v. *Walker, supra,* have (350 U. S. at p. 438) "become part of our constitutional fabric". The *Ullmann* decision disposes of petitioner's assertion that the Part I immunities even if incorporated into Section 305 (d) are not co-extensive with the privilege against self-incrimination.

The immunity accorded petitioner would protect him, not only from the use of his testimony either in proceedings under the Motor Carriers Act and any other proceeding involving a matter arising under that Act, but from use of information or leads obtained from

the compelled testimony. In short, since the "Immunity displaces the danger" petitioner's privilege of silence ceases. *Ullmann* v. *United States, supra* (350 U. S. at p. 439).

III

THE PROCEDURE FOLLOWED IN THIS CASE COMPORTS WITH DUE PROCESS

A. PETITIONER WAS GIVEN AMPLE NOTICE AND OPPORTUNITY TO BE HEARD

Petitioner argues that, if he was guilty of contempt at all, it was committed before the grand jury after he had been directed by the court to answer, and that the court violated his procedural rights when it called him before it, and gave him another opportunity to answer the questions, before adjudicating him in contempt. Thus, petitioner contends that since the contempt, if any, took place before the grand jury and not in the presence of the court the proceedings should have been on notice pursuant to Rule 42 (b) of the Federal Rules of Criminal Procedure. We submit, however, that when the court itself asked the questions in the presence of the grand jury and petitioner refused to respond, stating that he would continue in his refusal if returned to the grand jury room, there was contempt committed in the presence of the court, and that the summary procedure permitted by Rule 42 (a) was therefore proper.

The argument that the procedure followed in this case deprived petitioner of his rights is without merit. The sole issue involved in the case was one of law—whether petitioner could validly claim the privilege in the face of the statutory grant of immunity. There

were no factual issues to be resolved. On the issue of law, petitioner had more than ample notice and more than ample opportunity to argue his position. He was told at his first appearance before the grand jury on April 5, 1957, that, if he persisted in his refusal to answer in the face of the statutory immunity, he was subject to contempt proceedings.[13] Thereafter, the issue as to whether the statutory grant of immunity applied to petitioner was fully argued before the district court. On April 8, 1957, the court made its initial and basic ruling on that question of law, ruling that the statute did afford petitioner complete immunity (R. 34–35).

All the procedures thereafter had the effect of giving petitioner a chance to comply with the court's direction before the ruling was embodied in a final order. After the court made its ruling on the issue of law, petitioner was directed to answer the questions before the grand jury. When he refused to do so before the grand jury, the grand jury requested the assistance of the court. The court then gave petitioner still another chance to answer in the presence of the court and of the grand jury. At this time also, the court gave petitioner still another opportunity to argue his legal position that the immunity did not apply (R. 41–47). But when, after two extended arguments on the only issue involved, the court adhered to its original ruling, and petitioner adhered to his refusal to accept such

[13] Actually, even before that time, petitioner's attorney had been advised of the government's intention to compel petitioner's testimony under the statutory grant of immunity. See fn. 1, *supra*, p. 6.

ruling, nothing more remained to be decided. A summary adjudication for contempt for refusal to obey the direction of the court and imposition of sentence were therefore entirely proper and consonant with due process. The procedure followed here is the usual method by which the court's direction to answer is incorporated in a final judgment which may be tested on appeal. *Rogers* v. *United States,* 340 U. S. 367;[14] *Wilson* v. *United States,* 221 U. S. 361; *Hale* v. *Henkel,* 201 U. S. 43; *United States* v. *Curcio,* 234 F. 2d 470, 483 (C. A. 2), reversed on other grounds, 354 U. S. 118; *Lopiparo* v. *United States,* 216 F. 2d 87 (C. A. 8), certiorari denied, 348 U. S. 916; *United States* v. *Weinberg,* 65 F. 2d 394, 396 (C. A. 2), certiorari denied, 290 U. S. 675. The federal law in this respect follows the common law. *People ex rel. Phelps* v. *Fancher,* 4 Thompson & Cook 467 (N. Y., 1874);

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[14] In the *Rogers* case, petitioner refused to answer the questions of a grand jury and was brought before the district court which committed her to the custody of the marshal pending her hearing the next day relative to her reasons for refusing to answer. The next day, on her representation that she would purge herself, she was allowed to return to the grand jury room where she again refused to answer questions. The court then asked her if she still persisted in her refusal, and when she said she did, held her in criminal contempt under the summary disposition procedures. Although the issue of the validity of these procedures was raised before this Court (see Pet. Br. Nos. 20, 21, 22, O. T. 1950, pp. 54–58; Br. for United States, *Ibid.*, pp. 51–53), the Court ruled that the privilege was not available to Rogers and sustained the conviction, thus in effect overruling her contentions of procedural unfairness. A petition for rehearing which complained of the Court's silence on the procedural issue (Pet. for Rehearing, No. 20, O. T. 1950, pp. 6–10) was denied (341 U. S. 912).

People ex rel. Hackley v. *Kelly*, 24 N. Y. 74, 79–80 (1861); *In re Belle Harris*, 4 Utah 5, 8–9 (1884).

Traditionally, the grand jury has been regarded as an "appendage" [15] of the court, and while independent of the court in many respects, it is totally dependent on the court in compelling the testimony of witnesses. The process by which a witness is compelled to attend and testify is that of the court, and "if, after appearing he refuses to testify, the power, as well as the duty, to compel him to give testimony is vested in the court, and not in the grand jury." *Wilson* v. *United States*, 77 F. 2d 236, 242 (C. A. 8); *In re National Window Glass Workers*, 287 Fed. 219, 225 (N. D. Ohio); *United States* v. *Hill*, 1 Brock (Fed. Cas.) 156, 160; *Commonwealth* v. *Bannon*, 97 Mass. 214, 219. See, also, *In re Oliver*, 333 U. S. 257, 277–278.

On the refusal of a witness to answer questions, the grand jury takes him before the court for the dual purpose of obtaining (1) a ruling on his obligation to testify, and (2) a further appropriate order of the court to insure prompt compliance. *Carlson* v. *United States*, 209 F. 2d 209, 215–217 (C. A. 1); *Heard* v. *Pierce*, 62 Mass. 338, 342–345; and see Edwards, *Grand Jury* (1906), p. 133. At that juncture, when the court makes its ruling (here on the availability of the privilege) the witness has as yet committed no contempt, and (as in the case at bar) the court would normally instruct the witness to go back to the grand jury and answer the questions (*Wong*

[15] See *United States* v. *Dachis*, 36 F. 2d 601 (S. D. N. Y.); Rapalje, *Contempts* (1890) p. 83.

Gim Ying v. *United States*, 231 F. 2d 776 (C. A. D. C.)). An adamant refusal so to do by the witness in open court would constitute a contempt. The rule applicable in federal courts is stated in *Carlson* v. *United States*, 209 F. 2d 209, 216 (C. A. 1):

> What ensues when a court is called upon not to punish a completed contempt, but merely to rule on the availability of the privilege? If the court rules that the privilege was properly invoked, that is an end of the matter. If, on the other hand, the court rules (we assume correctly, and after the necessary hearing) that the privilege was not available under the circumstances, the court would then normally instruct the witness to go back to the grand jury and answer the question. If the witness then and there, in the face of the court, declines to do so, this is disobedience to a lawful order of the court, under 18 U. S. C. § 401 (3); and since this disobedience occurs in the "actual presence" of the judge it may be punished summarily under Rule 42 (a). If the witness, instead of disobeying the court's order in the actual presence of the judge, proceeds back to the grand jury room and there again refuses to answer the question which the court directed him to answer, this is still disobedience of a lawful order of the court within the meaning of 18 U. S. C. § 401 (3). But because such disobedience did not take place in the actual presence of the court, and thus could be made known to the court only by the taking of evidence, the court would have to conduct the proceeding in criminal contempt in accordance

with Rule 42 (b). See Ex parte Savin, 1889, 131 U. S. 267, 277, 9 S. Ct. 699, 33 L. Ed. 150.[16]

There is no doubt that, when petitioner, after having been directed by the court to answer, returned to the grand jury room and persisted in his refusal to answer, contempt proceedings could have been instituted under Rule 42 (b) which would have had to be on notice since such contempt would not have been in the presence of the court. *United States* v. *United Mine Workers,* 330 U. S. 258, 295–298; *Nye* v. *United States,* 313 U. S. 33, 40; *In re Fletcher,* 216 F. 2d 915 (C. A. 4), certiorari denied, 348 U. S. 931; *MacNeil* v. *United States,* 236 F. 2d 149 (C. A. 1), certiorari denied, 352 U. S. 912. Such a proceeding would have been necessary "to inform the court of events not within its own knowledge." *Sacher* v. *United States,* 343 U. S. 1, 9. But petitioner was deprived of no rights when the court chose instead to give petitioner one more chance to answer the questions in its presence and in the presence of the grand jury. At a hearing on notice after the refusal

[16] The facts of *Carlson* and *Wong Gim Ying* v. *United States,* 231 F. 2d 776 (C. A. D. C.), are clearly distinguishable. The contempt citation in *Carlson* was based on a refusal to answer questions before a grand jury, without an intervening court hearing to determine the witness' legal obligation to answer, followed by a disobedience to the court's order. In *Wong Gim Ying,* after the witness refused to answer the questions, as in the case at bar, and after considering and overruling her claim of privilege, the court adjudged her in contempt forthwith. Neither case suggests that, after an initial disobedience to the court's order to return to the grand jury room and answer the questions, the court cannot then order the witness to answer the questions in the presence of the grand jury and summarily hold him in contempt on his refusal to obey such final order.

before the grand jury, the only factual issue would have been whether petitioner refused to answer.[17] The fact that the court obviated the necessity for this proof by giving petitioner another chance certainly did not operate to his detriment. As for the opportunity to request the court to reconsider its original ruling which petitioner would have had at a Rule 42 (b) hearing, petitioner nevertheless had that opportunity since he was permitted to reargue the question at length.

As we have indicated above, the practice of the court in itself questioning the witness and seeking to elicit in the grand jury's behalf the information refused previously, prior to taking the final step of holding the witness in contempt, is a common procedure (*supra*, pp. 36–37). It has long been held to be the preferable procedure, when a witness refuses to give testimony in the grand jury room, "that the jury themselves should go into court with the officer and the witness, that the questions may be stated, or the

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[17] Contrary to petitioner's statements (Pet. Br. 25), there were no controverted factual issues for trial. At the argument on the original ruling, the only evidence which petitioner's counsel tendered related to facts concerning other investigations which petitioner contended would demonstrate the incriminatory nature of the questions (R. 10–11). The court after extended argument on this issue properly held the tendered evidence to be irrelevant, finding the immunity provided for in 49 U. S. C. 305 (d) sufficient to immunize petitioner from the direct and collateral effects of his grand jury testimony. It then ordered petitioner to return to the grand jury (R. 34–35). Since petitioner's obligation to testify was thus the subject of a definite and unequivocal ruling, the only issue at a contempt hearing would have been whether petitioner willfully violated the order of the court.

decision of the court made, in the presence both of the jury and the witness." *Heard* v. *Pierce, supra* (62 Mass. at p. 345). There the grand jury may not only obtain the court's ruling in respect to the witness' claim of privilege, if any, but the application of "its compulsory power to enforce obedience." Thompson and Merriam, *Juries* (1882), p. 699; and see *United States* v. *Dachis,* 36 F. 2d 601 (S. D. N. Y.); *United States* v. *Hill,* 1 Brock. (Fed. Cas.) 156, 160 (per Mr. Chief Justice Marshall); *In re Belle Harris, supra,* 4 Utah Rep. at pp. 8–9; *Commonwealth* v. *Bannon,* 97 Mass. 214, 219. There is no injustice to the defendant in the endeavor by the court, prior to the imposition of the punitive or coercive remedy of contempt, to obtain the testimony without use of that more drastic expedient. Compare *Rogers* v. *United States, supra* (340 U. S. at p. 370, fn. 4). This procedure, far from depriving the grand jury witness of procedural rights, as petitioner argues, actually affords him a *locus poenitentiae* before the court is faced with the necessity of finding him in contempt. As this Court recently stated in *Yates* v. *United States,* 355 U. S. 66, 75, "the more salutary procedure would appear to be that a court should first apply coercive remedies in an effort to persuade a party to obey its orders, and only make use of the more drastic criminal sanctions when the disobedience continues." While the same end might be achieved in trying a contempt under Rule 42 (b), F. R. Crim. P., and including a purge clause in the judgment, that more extended procedure would less readily produce the information desired by the grand jury and, in addition, have the less desirable

result of attaching prematurely a badge of criminality to the recalcitrant witness. Moreover, as the Court of Appeals observed (R. 61):

> There is good reason for providing for such summary procedure and for applying it to contumacious grand jury witnesses. The public interest requires that grand juries should suffer a minimum of delay in their investigations. Each delay of such an inquiry, however brief, multiplies the difficulties in getting facts, locating witnesses and finding the truth. Law enforcement faces enough difficulties without the added hazard of the unnecessary delays due to protracted hearings and adjournments which are not necessary. * * *

B. THE COURT HAD THE POWER TO PUT THE QUESTIONS TO THE WITNESS AND TO HOLD HIM IN CONTEMPT FOR HIS REFUSAL TO OBEY THE ORDER OF THE COURT

1. The power to compel the witness' testimony before the grand jury is, as we have shown (*supra*, pp. 37–38), a power of the court itself. The court, therefore, clearly had authority to put the questions to the witness, before the grand jury, rather than merely relying upon the report of what occurred before the grand jury. The court's power to hold witnesses who disobey its orders in contempt (*United States* v. *Hudson*, 7 Cranch. 32, 34) would surely include the power to allow the witness a final opportunity to comply with the court's order prior to the imposition of that sanction.

Petitioner's contention (Pet. Br. 28–30) that he had an absolute right as a defendant in a contempt proceeding not to take the stand, when, after disobey-

ing the court's order to testify before the grand jury on the second occasion he was brought again into court, misconceives the basis of the court's contempt citation. While petitioner's disobedience of the court's order to return and testify might have been made the basis of a contempt citation, the court chose not to regard the contempt as complete. Petitioner was called to the stand, not as a defendant to explain his prior acts of refusal before the grand jury, but rather as a grand jury witness. As the court pointed out, this proceeding was (R. 40) "a continuance of the grand jury proceeding before the Court".[18] Had petitioner given the answers requested or indicated his willingness to respond to them in the grand jury room, contempt proceedings would have been obviated. His testimony would in no way have incriminated him either in respect to a possible contempt citation or in respect to possible prosecution for substantive crimes

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[18] Government counsel explained the nature of the proceedings prior to the petitioner's contempt as follows (R. 36–37):

"The Government's understanding of the nature of this proceeding is this: At this point the grand jury is still merely requesting the assistance of the Court. What the Government would request is that if it appears, as will be shown by the testimony of the grand jury reporter, that the witness is persisting in his refusal, the Government will then request of this Court that the Court itself, in the presence of the grand jury, will put the six questions to the witness and ask him, first, whether he is willing to answer them now, and second, would he answer them if he were sent back to the grand jury again. And if the witness again refuses here and now in the physical presence of the Court or persists in his refusal to answer, that the witness be held in summary contempt under Rule 42 (a) of the Federal Rules of Criminal Procedure.

"The COURT. That is what I propose."

against which the immunity protected. In short, prior to the contumacy before the court for which he was cited in contempt, petitioner was not a defendant, and, but for his final defiance of the authority of the court, he would not have been cited in contempt. Up to that time he had not committed the act for which he was found in contempt. It was this last act of refusal in the presence of the court which constituted the contempt charged, the court plainly stating that petitioner was in contempt by reason of his (R. 45) "refusal to answer in the actual presence of this Court". The court's certificate also alleges this final act of disobedience to the court's authority as the basis of the contempt (R. 4–5).

2. When petitioner, in the presence of the court, willfully disobeyed a valid order of that court, it was proper summarily to punish him for contempt.

This conduct in the presence of the court constituted "court-disturbing misconduct" occurring "in the court's immediate presence" of which the judge had "personal knowledge * * * acquired by his own observation of the contemptuous conduct", justifying the summary procedure followed. *In re Oliver*, 333 U. S. 257, 275. Here, "The judicial eye witnessed the act and the judicial mind comprehended all the circumstances of aggravation, provocation, or mitigation; and the fact being thus judicially established, it only remained for the judicial arm to inflict proper punishment." *Ex parte Terry*, 128 U. S. 289, 312.

Such behavior before the court constituting disobedience of the court's authority—after every opportunity had been afforded the witness to argue his

legal justification for his refusal and to comply with the demand for his testimony—constitutes that kind of conduct which the courts have historically deemed subject to the summary contempt procedures. As this Court said in *Fisher* v. *Pace*, 336 U. S. 155, 159–160:

> Historically and rationally the inherent power of courts to punish contempts in the face of the court without further proof of facts and without aid of jury is not open to question. This attribute of courts is essential to preserve their authority and to prevent the administration of justice from falling into disrepute. Such summary conviction and punishment accords due process of law.

See also *Brown* v. *United States*, 356 U. S. 148, 152–153; *Yates* v. *United States*, 355 U. S. 66, 70–71; *In re Oliver*, *supra*, 333 U. S. at 274–275; *Cooke v. United States*, 267 U. S. 517, 534–536; *Eilenbecker* v. *District Court*, 134 U. S. 31, 36–37; *Ex parte Savin*, 131 U. S. 267, 277; Blackstone's *Commentaries*, pp. 1676–1679 (Lewis ed. 1897); Fox, *Contempt of Court* (1927), pp. 50–54.

C. PETITIONER CANNOT OBJECT TO THE SO-CALLED "SECRECY" OF THE CONTEMPT PROCEEDINGS

For the first time in the Court of Appeals, petitioner raised the contention that the proceedings in the district court were invalid because they were conducted in "secrecy" (R. 62). Petitioner continues to urge this point although no contention is (or was) made that petitioner's counsel was not present at all relevant times and the record in fact indicates his presence and full participation in the proceedings.

With respect to the presence or absence of members of the public, the record is less clear. The record indicates that on the morning of April 5, 1957, prior to hearing the legal argument relative to petitioner's claim of privilege, Judge Levet ordered the courtroom cleared of all but the interested parties. Petitioner made no objection to this procedure, and the session which ensued is captioned in the record as a "colloquy between court and counsel" (R. 6). During this morning "colloquy," no testimony was taken on the application to the court to compel petitioner to answer the questions and the session was devoted to legal argument. It is manifest that this April 5 proceeding, which culminated only in the court's order directing petitioner to return to the grand jury room, could in no sense be considered a contempt proceeding since the contempt did not arise until April 8, 1957. See *Carlson* v. *United States, supra* (209 F. 2d at p. 217).

The record is silent as to whether the courtroom in which the April 8 proceedings took place was open or closed to the public. The court below, apparently assuming that the courtroom was closed on April 8 as it was on April 5, noted the presence of petitioner's counsel and petitioner's failure to object to the clearing of the courtroom and held that petitioner could not then complain of the procedure followed (R. 62). Petitioner has stated that it "cannot factually be disputed" that the courtroom was cleared on April 8 (Pet. Br. p. 31) and we have, therefore, endeavored to ascertain, outside of the record, what in fact took place. We are informed by the former Assistant

United States Attorney who was in charge of the case that the April 8 proceedings were conducted in the courtroom in which the criminal calendar is usually called. This courtroom is generally open to the public but at the time of these proceedings the calendar call had been completed and there were, in fact, no spectators in the courtroom. The district judge did not order the courtroom barred to the public; no members of the public sought admission during the proceedings; and petitioner's counsel made no explicit request with respect to the admission of the public.[19] There was, therefore, no occasion for the trial judge to rule upon the question.

Regardless of whether a hearing conducted under the circumstances above described be denominated "open" or "closed," it is apparent that petitioner cannot object to this procedure for the first time in an appellate court. To the extent that the trial judge was continuing the grand jury inquiry, *i. e.*, asking the questions which petitioner had previously been asked in the grand jury room (R. 36–45), absence of the public would seem appropriate and in accord with the usual mode in which a grand jury operates. It should not be legally significant, in this regard, whether the trial judge physically goes to the grand jury room or the grand jurors go to a courtroom from which the public is absent. The only respect in which

[19] The objection raised by petitioner in the district court was that the court should proceed on notice under Rule 42 (b). Paraphrasing that Rule, defense counsel requested that petitioner "* * * be served or furnished with a notice in open court of the charges, the specifications and afforded an opportunity for a hearing, a full hearing" (R. 37).

the procedure here differed from that which might have prevailed had the judge gone to the grand jury room is that petitioner's counsel, and probably some court attendants, were present when the questions were put to petitioner by the court. But the petitioner can hardly object to the presence of his counsel; his complaint is that the proceedings were too secret, not too public. And, in any event, petitioner indicated that he would persist in his refusal to answer the questions were he to return to the grand jury room (R. 44).

Here, unlike the situation where contempts have been committed before judges sitting as one-man grand juries in secret session (cf. *In re Murchison,* 349 U. S. 133; *In re Oliver,* 333 U. S. 257), petitioner's contempt was committed in recorded proceedings at a time when he was represented by counsel. Up to this point the proceeding was, as we have pointed out (*supra,* pp. 43–45), essentially designed to afford petitioner a further opportunity to comply with the court's direction that he answer the questions before the court faced the necessity of adjudicating him in contempt.

If petitioner ever had a right to have the public present, in addition to his counsel, that right could only have arisen after it became apparent that, by virtue of his persistent refusal to testify, the inquiring function of the grand jury was thwarted and all that remained was the adjudication of contempt by the court. If petitioner had the right to have the public admitted (assuming, but not conceding, it had hitherto been barred) after his final refusal to

answer the questions, he not only failed to assert that right, but he cannot in any manner, real or hypothetical, demonstrate how he has been prejudiced by the procedures actually followed. All that took place after the judge indicated that in the light of petitioner's continued refusal to answer he was "forced to act upon this matter" (R. 45) was the reassertion by petitioner's counsel of his contention that the immunity provision did not apply and that the proceeding should be on notice (R. 45–47), and the court's adherence to its prior ruling. The adjudication of contempt (R. 47) and the sentence thereafter imposed (R. 49), of course, immediately became matters of public record and there was no attempt on the part of the court or counsel to conceal the proceedings. Since what took place at the final session on April 8, other than the legal argument upon which the court had previously made a definitive ruling, was essentially a continuation of the grand jury proceeding which, as we have seen, was properly conducted in the absence of the public, there was certainly no defect in the proceeding up to the time of sentencing. If for any reason the procedures followed upon sentencing were defective the proper remedy would be to remand the case to the district court for resentencing, not to vacate the adjudication of contempt.

IV

THE SENTENCE OF 15 MONTHS' IMPRISONMENT WAS NOT AN ABUSE OF THE DISTRICT COURT'S DISCRETION UNDER THE CIRCUMSTANCES

Petitioner also contends that his sentence of 15 months' imprisonment constitutes an abuse of the

court's discretion (Pet. Br. 31–32).[20] His argument on this point is (1) that other recalcitrant witnesses involved in other cases have received lesser sentences (although conceding that some have received longer) (Pet. Br. 31); (2) the criminal provisions of the Motor Carrier Act, Section 222 (49 U. S. C. 322) provide only for fines; and (3) the sentence failed to include a purge clause (Pet. Br. 32).

Petitioner's argument hardly justified his assertion that the district court, in imposing the 15-month sentence and the Court of Appeals in reviewing the judgment, abused their discretion. Whether the two courts below have committed such error cannot be resolved by a mathematical comparison of sentencing in other cases with the case at bar. This evaluation, which is the primary function of the trial court, depends on the peculiarities of each case and especially on "* * * the extent of the willful and deliberate defiance of the court's order [and] the seriousness of the consequences of the contumacious behaviour * * *." *Yates* v. *United States*, 355 U. S. 66, 75. The court in this case evidently regarded petitioner's conduct as motivated by a desire to obstruct the investigation. It was informed by government counsel that "[t]he

[20] Petitioner originally had contended, as did the petitioner in *Green* v. *United States*, No. 100, Oct. Term, 1957, that the sentencing power of federal courts in contempt proceedings was limited as a matter of law to one year's imprisonment, by virtue of the passage of the Clayton Act in 1914. That argument having since been rejected by this Court in *Green* v. *United States*, 356 U. S. 165, 180–183, he now abandons the contention and takes the position that his sentence was an abuse of discretion.

information that it is desired to elicit from this witness, I represent to the Court, is of the very greatest importance, and the witness' refusal to answer is a very great stumbling block to this investigation and to all these investigations" (R. 47). The court may well have felt that petitioner's behavior so effectively frustrated the grand jury's efforts and the court's ancillary power in its behalf that his contempt, as in *Green* v. *United States,* 356 U. S. 165, 188, "was by any standards a most egregious one."

The sentence of 15 months is by no means extraordinary in its severity as compared to other contempt case. *Green* v. *United States, supra; Hill* v. *United States ex rel. Weiner,* 300 U. S. 105, 106; *Lopiparo* v. *United States,* 216 F. 2d 87, 92 (C. A. 8), certiorari denied, 348 U. S. 916; *Warring* v. *Huff,* 122 F. 2d 641 (C. A. D. C.), certiorari denied, 314 U. S. 678; *Conley* v. *United States,* 59 F. 2d 929 (C. A. 8). And while this Court has, as it stated in *Green* case (356 U. S. at p. 188), "taken pains to emphasize its concern with the use to which the sentencing power has occasionally been put," by remanding cases or modifying such sentences (cf. *Nilva* v. *United States,* 352 U. S. 385, 396; *Yates* v. *United States,* 356 U. S. 363, 366, 367), no special circumstances demonstrating that the district court rendered a sentence disproportionate to the contempt are present in this case.

Petitioner's further contention that the penalty provisions (49 U. S. C. 322) of the Motor Carrier Act provide only for fine (a factor he contends was overlooked by the Court of Appeals (Pet. Br. 32)) has no relevance, since no penalty there provided specifi-

cally reaches contempts of court, and thus no such exact basis of comparison is available. Cf. *Green* v. *United States, supra*, where this Court observed that the three-year contempt sentences, there involved, were well within the five-year maximum provided for the substantive offense of bail jumping (356 U. S. at p. 189). Petitioner's blocking of the investigation is different in character from the offenses defined by the Motor Carrier Act. In the circumstances of this case, the fifteen-month sentence was not beyond the bounds of the reasonable exercise of the district court's discretion. See *United States ex rel. Brown* v. *Lederer*, 140 F. 2d 136, 138–139 (C. A. 7), certiorari denied, 322 U. S. 734; *Creekmore* v. *United States*, 237 Fed. 743, 754–755 (C. A. 8).[21]

[21] On the assumption that the 15-month sentence was intended by the court to be coercive rather than punitive, petitioner argues that it was incumbent on the court to provide a purge clause in the sentence. The sentence indicates, however, that the court considered petitioner's conduct to be obstructive and that the court intended to punish petitioner for his flouting of the authority of the court. The contempt was criminal. *United States* v. *United Mine Workers of America*, 330 U. S. 258, 296–300; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 441–445; *Parker* v. *United States*, 153 F. 2d 66, 70–71 (C. A. 1). While the court might have provided for a purging of the punishment (cf. *Grant* v. *United States*, 227 U. S. 74, 78; *Lopiparo* v. *United States*, 216 F. 2d 87, 91 (C. A. 8), certiorari denied, 348 U. S. 916; *Ibid.*, 222 F. 2d 897 (C. A. 8); *United States* v. *Curcio*, *supra* (234 F. 2d 470 (C. A. 2)), its failure to do so did not invalidate the sentence. As the government counsel noted at the time sentence was imposed (R. 48), if at any time within 60 days from the termination of these proceedings petitioner desires to come forward with the testimony heretofore refused, the court can consider that fact in passing upon a motion for reduction of sentence under Rule 35 of the Federal Rules of Criminal Procedure.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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